

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 10-0039

ANDY JENSEN,

Plaintiff/Appellant,

v.

ABSAROKEE WATER AND SEWER DISTRICT,
KARL GAUSTAD, MIKE BORSETH, MARY ANNA
ESPELAND, WENDY SCOTT and DEANN GAUSTAD,

Defendants/Appellees.

ANSWER BRIEF OF APPELLEES

On Appeal from the Montana Twenty-second Judicial District Court
Stillwater County
Hon. Randall I. Spaulding, Presiding Judge

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ANSWER BRIEF OF APPELLEES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Defendants/Appellees (hereinafter referred to as “the Board”) disagree with Plaintiff/Appellant’s (hereinafter referred to as “Jensen”) formulation of the Issues Presented for Review and believe that the issues are more appropriately formulated as follows:

1. Whether judgment on the pleadings was appropriate;
2. Whether the individual board members are immune from suit;
3. Whether Jensen’s Open Meeting claims are time barred;

4. Whether a Writ of Mandate should issue on the facts alleged in Jensen's Complaint;
5. Whether Jensen's slander claims are barred by privilege; and
6. Whether Jensen is entitled to Injunctive Relief.

STATEMENT OF THE CASE

The Board believes the Statement of the Case is more appropriately phrased as follows:

This action was commenced on June 25, 2009, when Jensen filed a "Complaint & Application for Preliminary Injunction & Temporary Restraining Order, Writ of Mandate & Demand for Jury Trial," naming the individual Board members as well as the Absarokee Water District as Defendants and seeking, in addition to temporary and preliminary relief, that the Defendants make available to Jensen certain tape recordings, that he recover damages from one Board member for slander which was alleged to have occurred during a meeting, that the Court issue a Writ of Mandate controlling future actions of the Board, and that the Court award Jensen his attorney fees.

Jensen's filing was accompanied by "Preliminary Injunction & Temporary Restraining Order & Order to Show Cause," which was granted ex parte on the same day the action was filed. The Court held hearings on Jensen's Order to Show Cause on August 12 and August 18, 2009 in Columbus, Montana and on August

31, 2009 in Roundup, Montana.

The Board answered the Complaint while the Order to Show Cause hearing process was ongoing, and moved for judgment on the pleadings.

The Court granted the Board's Motion for Judgment on the Pleadings, and this appeal ensued.

STATEMENT OF THE FACTS

While the transcript of the hearings held on the Order to Show Cause regarding Jensen's request for temporary and preliminary injunctive relief total more than 500 pages, the relevant facts are contained in Jensen's Complaint and the Board's Answer, with Jensen's Complaint supplying the factual allegations and the Board's Answer containing certain affirmative defenses.

Jensen's Complaint, which was filed on June 25, 2009, after reciting various conclusions of law, requests certain temporary and preliminary relief, and then makes application for a writ of mandate. The application for the writ of mandate alleges various events concerning meetings which occurred on January 9, 2009¹, February 12, 2009², March 12, 2009³, and April 15, 2009⁴. Jensen alleges that each of these meetings was improperly closed, that with regard to the meetings of January 9, 2009, March 12, 2009 and April 15, 2009 the portions of the meetings

¹ Complaint, paragraphs 27 through 29

² Complaint, paragraph 30

³ Complaint, paragraphs 12 and 13

⁴ Complaint, paragraphs 33 and 34

alleged to have been improperly closed were tape recorded, and that the Board has denied Jensen access to these tapes.⁵ Jensen also alleges he was slandered by a statement made by one Board member in the meeting of April 15, 2009.

The precise nature and custody of the tapes was clarified during the Order to Show Cause hearings. The tapes of the executive sessions are available to the Board only with consent of Jensen, since the tapes are kept in a locked cabinet with two locks, which requires the joint action of both the Board and Jensen to access since each has a lock on the cabinet.⁶ The tapes in question were delivered to the Court, which found them to be inaudible.⁷ Jensen has and continues to limit Board access to the tapes.⁸

The Board's Answer raised as affirmative defenses the immunity of the individual Board members under Montana Code Annotated Section 2-9-305⁹; the 30-day statute of limitations on actions to enforce rights under the public participation and Open Meeting laws of Montana set out in Montana Code Annotated Sections 2-3-114 and 2-3-213¹⁰; and the privilege set out in Montana Code Annotated Section 27-1-804¹¹ for statements made in an official proceeding. The Board also affirmatively pled that the tapes in question were not public

⁵ Complaint, paragraphs 29, 32, and 36

⁶ Transcript, August 12, 2009, Lundbeck, page 136, line 3 to line 14

⁷ Transcript, August 31, 2009, Discussion of Counsel, page 159, line 14

⁸ Transcript, August 31, 2009, Discussion of Counsel, page 161, line 15 to line 17 and page 162, line 9 to line 21

⁹ Answer, Thirteenth Affirmative Defense

¹⁰ Answer, Sixth Affirmative Defense

¹¹ Answer, Fifteenth Affirmative Defense

records¹² and that portions of the meeting were appropriately closed to discuss advice of counsel¹³.

Jensen's Complaint requested relief in the form of temporary or preliminary injunctive relief¹⁴; an order requiring delivery of the tapes in question to him "forthwith"¹⁵, damages for slander¹⁶, and for a Writ of Mandate controlling the conduct of future meetings, access to District records, and requiring the Board to refrain from taking any disciplinary action against Jensen without a court hearing.¹⁷

STANDARD OF REVIEW

Because a motion for judgment on the pleadings is decided as a matter of law, this Court reviews the grant of such a motion for correctness. In *Ritter v. Bill Barrett Corp.*, 2009 MT 210 ¶ 10, 351 Mont. 278, 280, 210 P.3d 688, 690), this Court described the standard of review for judgment on the pleadings in the following terms:

A party moving for judgment on the pleadings pursuant to M.R.Civ.P. 12(c) must establish that no material issue of fact exists and that it is entitled to judgment as a matter of law. Because a motion for judgment on the pleadings is decided as a matter of law, we review it for correctness. *Nelson v. Barlow*, 2008 MT 68, ¶9, 342 Mont. 93, 179 P.3d 529. The pleadings are to be construed in the light most favorable to the nonmoving party, whose allegations are taken as true. *Nelson*, ¶9. A motion for judgment on the pleadings is appropriate

¹² Answer, Sixteenth Affirmative Defense

¹³ Answer, Ninth Affirmative Defense

¹⁴ Complaint, Prayer for Relief, paragraphs 1,3, and 4

¹⁵ Complaint, Prayer for Relief, paragraph 2

¹⁶ Complaint, Prayer for Relief, paragraph 5

¹⁷ Complaint, Prayer for Relief, paragraph 6

when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court. *Firelight Meadows, L.L.C. v. 3 Rivers Tel. Co-op., Inc.*, 2008 MT 202, ¶10, 344 Mont. 117, 186 P.3d 869. In this case, the pertinent facts are not controverted.

Similarly, in this case the pertinent facts are not controverted and this Court's review is simply a review for the correctness of the District Court's decision granting the Motion for Judgment on the Pleadings.

SUMMARY OF THE ARGUMENT

I. The Court properly granted judgment on the pleadings.

A. This case is about the pleadings that were actually filed and the relief that was actually sought by Jensen. To that end, the Court must review what the Complaint actually alleged and the relief actually sought.

B. There are no disputed facts regarding the issues actually raised by the Complaint and the relief actually sought in the Complaint.

II. The Court properly determined that the individual Board members were immune from suit under Montana Code Annotated Section 2-9-305, which provides individual immunity for Board members sued for actions taken in the course and scope of their duties. The Court did not determine that the Board was immune, Jensen's assertion to the contrary. The fact that an action is alleged to be illegal or unauthorized does mean that the action was "outside the course and scope" of the officer's or employee's employment.

III. The Court properly determined that Jensen's Open Meeting claims were time barred. This Court has been very clear in requiring that claims for Open Meeting violations be brought by petition alleging violation of Montana Code Annotated Section 2-3-203, and in holding that writs of mandamus are not appropriate for the enforcement of Open Meeting provisions. Montana Code Annotated Sections 2-3-114 and 2-3-213 require that such actions be brought within 30 days of the violation or the time it becomes known to the petitioner. Since the meetings alleged in the Complaint all occurred more than 30 days prior to the filing of the Complaint, the Court properly found that any requested relief with regard to those meetings was untimely.

IV. The Board is not subject to a clear duty to produce the tapes of the executive sessions either to Jensen or to the public generally. Quite simply, these tapes are for reference purposes only and as such are excluded from the definition of public record by Montana Code Annotated Section 2-6-401(2)(c). The record establishes that the Board does not have access to these tapes without the consent of Jensen. The Board cannot review the tapes, without Jensen's cooperation, for privileged material. Jensen's consent for such a review has not been forthcoming in any manner that will not result in a waiver of any attorney-client or litigation strategy privileges. Finally, as the District Court notes in footnote 24 of its opinion, presentation of the tapes to the Court for *in camera* inspection pursuant to

agreement between Jensen and the Board resulted in the conclusion that the tapes are inaudible and of no use.

V. Plaintiff's slander claim is barred by privilege. Jensen's Complaint is clear. He alleges that one Board member, Mike Borseth, slandered him during a Board meeting; and his prayer for relief expressly claims damages for that specific slander. No other defamation claims are made and no relief is sought for any other defamation claim. While Jensen claims that the meeting at which the alleged slander occurred was improperly closed, the fact is, it was still an official meeting of the Board. Montana Code Annotated Section 27-1-804(2) provides that statements made in official meetings are privileged.

VI. Jensen requested injunctive relief only in the form of a Preliminary Injunction and a Temporary Restraining Order. Nothing in the Complaint prays for permanent injunctive relief and, even as a preliminary matter, Jensen was not entitled to such relief. The Court having entered its Judgment on the Pleadings in favor of the Board on the relief requested in the Complaint, Jensen's requests for preliminary and temporary relief are moot in any event.

ARGUMENT

I. The District Court properly granted judgment on the pleadings.

Given that the Court's action in this case was to grant judgment on the pleadings, the most striking aspect of Jensen's argument on this issue is his total

failure to relate the alleged factual disputes to the actual issues raised by the pleadings, and the law that governs those issues.

In this regard, Jensen filed a Complaint that consisted of essentially three parts:

(1) General allegations regarding the nature of the District and Board, the fact that an ad had run (either with or without Board action), and legal conclusions regarding open meetings¹⁸;

(2) An Application for Preliminary Injunction & Temporary Restraining Order which barred the Board from taking any action with regard to Jensen's employment and required delivery of the tapes of the disputed meetings to Mr. Jensen¹⁹; and

(3) An "Application for a Writ of Mandate Violation of Public Right to Know, Violation of Open Meeting, Violation of Access to Public Records" in which the Jensen alleged various Open Meeting violations, a refusal to provide tapes of the meetings alleged to have been improperly closed, and slander of Jensen by one Board member²⁰.

Beyond issues related to the requested preliminary and temporary relief, the prayer for relief in the Complaint consists of three items: (1) a request for an order that the tapes of the disputed meetings be delivered "forthwith" to Jensen; (2) a

¹⁸ Complaint, paragraphs 1 through 12

¹⁹ Complaint, paragraphs 13 through 24

²⁰ Complaint, paragraphs 25 through 37

request that Jensen recover damages “by reason of Defendant Borseth’s slander;” and (3) that a writ of mandate issue controlling the future conduct of the Board and its employment relationship with Jensen.²¹

Jensen’s argument is that each of the red herrings raised in the pleadings or in the course of the Order to Show Cause hearing needs to be addressed. The Board’s position is that the course of proceeding should be governed by the pleadings and that, unless Jensen demonstrates either how the facts he asserts entitle him to the relief sought on the cause of action that he framed or prevent the granting of relief to the Board, those facts are irrelevant to the issue before the Court.

As will be demonstrated in the following sections addressing the specific issues presented by Jensen’s Complaint, the District Court properly granted the Board judgment on the pleadings since the pled facts do not entitle Jensen to the relief he sought.

II. The District Court properly determined that the individual Board members were immune under Montana Code Annotated Section 2-9-305.

The Board is uncertain as to the basis for the assertion in Jensen’s Brief (Jensen Brief, pp. 21 and 22) that the Court found both the District and individual Board members immune. The District Court’s Order on this point seems very clear with the District Court actually ordering on this point that: “Accordingly the

²¹ Complaint, Prayer for Relief, paragraphs 2, 6, and 7

individual board members, Karl Gaustad, Mike Borseth, Mary Anna Espeland, Wendy Scott, and Deann Gaustad are immune for suit and hereby **dismissed** from these proceedings.” (District Court Order granting Defendant’s Motion for Judgment on the Pleadings, page 5, line 24 to page 6, line 1; emphasis in original).

Similarly puzzling is Jensen’s allegation that the Board must somehow make an election with regard to Board President Karl Gaustad’s action in placing an advertisement in the Stillwater Times. (Jensen’s Brief, page 21.) Since no relief is sought against Karl Gaustad individually in Jensen’s Complaint and he is named as a member of the Board, how this becomes an issue is a mystery.

In any event, the District Court was correct in its determination that, under this Court’s well-established law, the individual Board members were immune for actions taken within the course and scope of their duties.

In *Kenyon v. Stillwater County*, 254 Mont. 142, 147, 835 P.2d 742, 745 (1992), this Court held that a county official acting within the scope of his duties was immune from individual liability under Montana Code Annotated Section 2-9-305 (5). *Kenyon* was followed by *Kiely Const. L.L.C. v. City of Red Lodge*, 2002 MT 241 ¶ 89, 212 Mont. 52, 57 P.3d 836, 855, wherein this Court held:

However, we conclude the first sentence of § 2-9-305(5), MCA, is on its face, a complete bar to holding the individual council members liable.

The Court then went on to affirm the district court's grant of summary judgment to the individual defendants.

In *Germann v. Stephens*, 2006 MT 130 ¶ 44, 332 Mont. 303, 137 P.3d 545, 553-554, this Court affirmed a district court award of attorney fees to city council members named as defendants in an action brought against them in their individual capacities, saying:

The plain language of § 2-9-305(5), MCA, and our decision in *Kenyon* demonstrate that the Council Members clearly enjoyed immunity from *Germann's* state law claims. We therefore agree with the District Court's determination that § 1988 entitled the Council Members to attorneys' fees for *Germann's* state law claims against them in their individual capacities.

Jensen's Complaint complains of actions and seeks relief for actions that could only have been taken by the Board members in the course of performing actions within the scope of their duties as Board members. By the plain language of Montana Code Annotated Section 2-9-305(5), and by the repeated decisions of this Court, the Board members are entitled to judgment on the pleadings dismissing this action against them in their individual capacities.

The District Court's order dismissing the individual Board members as Defendants should be affirmed.

III. The District Court properly determined that Jensen's Open Meeting claims were time barred.

Jensen's argument on this point is effectively nonexistent. Apparently, his current position is that no relief is sought for the alleged violations that occupy so much space in his Complaint and that he is merely seeking prospective relief. If this is Jensen's current view, it is at odds with the Complaint actually filed, in which he alleges that "A writ of mandate is appropriate to void illegal meetings or actions by Defendant Absarokee Water & Sewer District and actions by Defendant Board Members contrary to law. This new position is certainly understandable, since the clear and explicit holding in *Goyen* is that mandamus is not an appropriate remedy. In the words of this Court:

We take this opportunity to reiterate that actions for violations of the open meeting law are appropriately brought by a petition alleging violation of the act pursuant to § 2-3-203, MCA. Writs of mandamus and prohibition are not appropriate for the enforcement of those provisions.

(*Goyen*, 276 Mont. at 223, 915 P.2d at 831.)

As appears to now be tacitly conceded by Jensen, his failure to file a petition alleging a violation of Montana Code Annotated Section 2-3-203 within the 30 days allotted for such filing by Montana Code Annotated Section 2-3-213 now bars any relief for those meetings; and the District Court was correct in ruling that any such claims were barred.

Since mandamus lies only to compel the exercise of a clear legal duty, not to control the exercise of discretion, and issues only when there is not a plain, speedy, and adequate remedy at law (Montana Code Annotated Section 27-26-102 and *Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation*, 2009 MT 181 ¶16, 351 Mont. 26, 33-34, 208 P.3d 868, 873), it is not appropriate to control the future conduct of meetings where the chair is given discretion under certain limited circumstances to close meetings. *See* Montana Code Annotated Sections 2-3-203(3) and (4). This is especially true since Montana Code Annotated Section 2-3-213 provides a clear speedy remedy at law. Given its limitations, mandamus is even less appropriate to control a board's ongoing employment relationship with an employee. It is difficult to imagine any relationship which would more involve the exercise of discretion and, again, there is a clear speedy remedy at law should an employer board violate an employee's rights, in the form of an action under the Wrongful Discharge Act.

This Court should affirm the District Court and find that any allegations of Open Meeting violations regarding meetings held on January 9, 2009, February 12, 2009, March 12, 2009, and April 15, 2009, the only meetings mentioned in the Complaint, are time barred.

IV. The Board is not subject to a clear duty to produce the tapes at issue.

As this issue is considered, it is important that the Court bear in mind the manner in which Jensen has pled his Complaint. It is also important to remember that this is not a discovery issue.

All of the substantive relief is sought in the form of a writ of mandate. Why Jensen chose to so plead his action is a question only he can answer; but to prevail, he must as a preliminary step, demonstrate a clear legal duty to perform the act requested. In this case the act requested is to deliver to Jensen certain tapes which are asserted to be public records of the Absarokee Water and Sewer District. The tapes sought are retained by the Board for reference purposes only and are not a part of the permanent records of the Board.

In 2003, the Legislature made it clear that the term “public record” does not include the tapes sought here, by providing a definition of local government records that excludes from the definition of “public record” precisely the records sought in this case. In Montana Code Annotated Section 2-6-401(2)(c), the Legislature explicitly provided that the term “public record”:

... does not include any paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other type of document that is for reference purposes only, a preliminary draft, a telephone messaging slip, a routing slip, part of a stock of publications or of preprinted forms, or a superseded publication.

If the tapes are public records, the duty of the Board is to have the tapes available for public inspection and copying during normal business hours, not to deliver such records to the custody of any citizen who makes a request. In fact, the law provides that a public officer is entitled absolutely to the possession of the records pertaining to or in the custody of the officer by virtue of his or her office, and that “any record, a transcript of which is admissible in evidence” may not be removed from the building where it is kept except upon court order. (Montana Code Annotated Sections 2-6-105 and 2-6-106). In this case, the records, alleged to be public, cannot even be released to Board members or the general public for inspection and copying during normal business hours without the consent of Jensen, who retains a separate lock on the file cabinet where the tapes are stored.

The Board is allowed to close meetings to protect individual privacy and to discuss litigation strategy. (Montana Code Annotated Sections 2-3- 203(3) and (4). It would seem to defeat the purpose of these exemptions from public disclosure to subject them to a mandatory duty to release the records of these discussions. It was on this basis that the District Court determined that mandamus was an inappropriate remedy to provide the relief requested, holding that “... there is no *clear duty* on the part of the Absarokee Water & Sewer District to release the tapes under §2-6-101 and a Writ of Mandate should not, therefore, issue to compel their

release to the Plaintiff or the public pursuant to that statute.” (District Court Order Granting Defendants’ Motion, page 10, lines 2 to 7; emphasis in original.)

Jensen chose to seek relief in the form of a writ of mandamus. To obtain the issuance of a writ of mandate, Jensen must establish the existence of a clear legal duty to perform the act sought to be compelled. Since Jensen has failed to establish a clear legal duty that requires the Board to provide unlimited access to the tapes, this Court should affirm the District Court’s grant of judgment on the pleadings to the Board.

V. The District Court correctly determined that Jensen’s slander claims were barred by privilege.

Jensen has apparently conceded that his claim against Board member Mike Borseth for slander is barred by the privilege set out in Montana Code Annotated Section 27-1-804 for statements made in an official meeting, since no argument is raised in his Brief regarding this issue. Accordingly, this Court should affirm the District Court’s ruling that Jensen’s slander claim is barred by privilege and that no other defamation claims are pled by Jensen. (District Court Order granting Defendants’ Motion, page 11, line 12 to page 13, line 6).

VI. Jensen’s requests for preliminary and temporary injunctive relief were properly denied and are now moot.

This issue is addressed indirectly in Jensen’s argument that the Wrongful Discharge Act is not an adequate remedy at law for all of Jensen’s concerns. No

one has suggested that Jensen's remedy for alleged Open Meeting or public participation violations or denial of access to public records is provided by the Wrongful Discharge Act. As the District Court noted in its discussion of those issues, a plain, speedy and adequate remedy at law for those violations, should they be established, is provided by petition pursuant to Montana Code Annotated Section 2-3-213 (District Court Order granting Defendants' Motion , page 9, lines 5 to 8) or other action at law.

It is only with regard to Jensen's request for a Writ of Mandamus that requires the Board "... to refrain from adverse employment or disciplinary action against the Plaintiff until this court may conduct a hearing²²," that the adequacy of the Wrongful Discharge Act as a plain, speedy and adequate remedy at law is discussed. (District Court Order granting Defendants' Motion, page 11, lines 2 to 7).

If Jensen were discharged from employment and he claimed that discharge, then his remedy would be under the Wrongful Discharge Act, which is specifically declared by the Legislature to be "the exclusive remedy for wrongful discharge." Montana Code Annotated Section 39-2-902. Accordingly, to the extent -- and only to the extent -- that Jensen may have, at some point in the future, a claim for wrongful discharge, then he will a plain, speedy and adequate remedy at law; and

²² Complaint, Prayer for Relief, paragraph 6

the prayed-for Writ of Mandate is as inappropriate on these concerns as it is, because of the availability of other remedies, on the other issues raised by him.

With regard to the requested temporary and preliminary relief, the District Court concluded that such relief was inappropriate, both because it improperly limited the Board's authority under Montana Code Annotated Title 7, Chapter 13, Parts 22 and 23 to manage and supervise Jensen, and that, accordingly, the requested injunctive relief could not be granted since Montana Code Annotated Section 27-19-103(4) provides an injunction shall not issue to prevent the execution of a public statute by officers of the law for a public benefit. (District Court Order granting Defendants' Motion, page 13, lines 16 to 25).

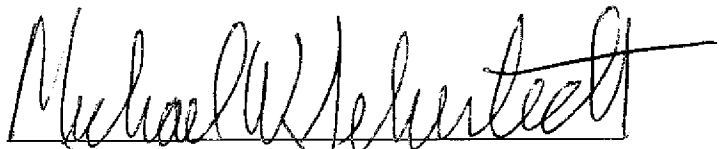
The District Court further concluded that, insofar as Jensen sought injunctive relief to address his employment issues, he had not pled that pecuniary compensation would not provide him an adequate remedy or that his damages would be incalculable in the event his employment was terminated at some point in the future. Accordingly, the District Court held that Jensen was not entitled to injunctive relief based on the pleadings since, as a matter of law, the Montana Wrongful Discharge Act provided an adequate remedy for any discharge claim he might have if he were terminated at some point in the future. (District Court Order Granting Defendants' Motion, page 14, lines 5 to 9).

In any event, since the only injunctive relief sought by Jensen's Complaint was preliminary and temporary, the District Court's determination that the Board was entitled to judgment on the pleadings on the substantive relief sought in the Complaint renders moot the question of preliminary and temporary relief pending resolution of the case.

CONCLUSION

Defendants/Appellees Absarokee Water and Sewer District and Board Members Karl Gaustad, Mike Borseth, Mary Anna Espeland, Wendy Scott, and Deann Gaustad request this Court to affirm the decision of the District Court in its entirety.

RESPECTFULLY SUBMITTED this 28th day of June, 2010.


MICHAEL W. SEHESTEDT
Counsel for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of June, 2010, a true and correct copy of the foregoing was deposited in the United States mail, postage prepaid, addressed to opposing counsel of record, as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) , Mont.R.App.P., I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2007 is 4,448, excluding Certificate of Service and Certificate of Compliance.


CAROL A. KNIGHT